

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Access Charge Reform)	
)	CC Docket No. 96-262
Southeast Telephone, Inc.)	
Petition for Waiver of Section)	
61.26(a)(6) of the Commission's)	
Rules)	

AT&T COMMENTS

Pursuant to the Commission's April 2, 2004 Public Notice (DA 04-936), AT&T Corp. ("AT&T") submits these comments on the petition of Southeast Telephone, Inc. ("Southeast") for a waiver of Section 61.26(a)(6) of the Commission's rules, 47 C.F.R. § 61.26(a)(6). The petition should be denied because Southeast has failed to demonstrate that it satisfies the threshold showing of unique circumstances required for grant of a waiver, and because in all events the requested waiver is fundamentally inconsistent with (and, if granted, could subvert) the Commission's policy objectives underlying the *CLEC Access Charge Order* in which the Commission adopted the rule in issue here.¹

Southeast is a competitive local exchange carrier ("CLEC") that provides exchange access services for approximately 12,000 business and residential access lines in portions of southeastern Kentucky. Pet., p. 1. The petition states (p. 3) that Southeast now qualifies and operates as a "rural" CLEC under the *CLEC Access Charge Order* and Section 61.26(a)(6) implementing that decision, in that no part of Southeast's service area

¹ *Access Charge Reform*, 16 FCC Rcd 9923 (2001) ("*CLEC Access Charge Order*").

falls within any incorporated place of 50,000 or more inhabitants or within an urbanized area, as defined by the Census Bureau. Pursuant to Section 61.26(e) of the Commission's rules, 47 C.F.R. § 61.26(e), Southeast is therefore permitted to assess tariffed interstate access charges on interexchange carriers ("IXCs") such as AT&T at the "rural exemption" rate. This currently equates to a maximum rate of \$ 0.02306 per minute for Southeast instead of the maximum benchmark rate of \$ 0.012 per minute for tariffed interstate access otherwise required under the *CLEC Access Charge Order* and the Commission's access charge rules.²

The petition states (p. 3) that Southeast "[f]rom time to time" receives requests from its business customers to provide service to a location (such as a branch sales office) within urbanized areas. Southeast also states (*id.*) that it receives service requests from parents in its service area to provide telephone service for children attending college in a metropolitan area. Were Southeast to accede to such requests from either its business or residential customers, it would cease to qualify as a rural CLEC

² The ceiling for tariffed interstate access charges under the "rural exemption" is equal to the rate prescribed in the National Exchange Carrier Association ("NECA") interstate access tariff, assuming the highest rate band for local switching and the transport interconnection charge, reduced by the NECA tariffed carrier common line charge where the competing incumbent LEC ("ILEC") – such as Southeast's principal competitor, BellSouth -- is subject to the Commission's *CALLS Order*, 65 FR 38684 (June 21, 2000). See 47 C.F.R. § 61.26(e). In addition to the prescribed per minute rate ceiling, an IXC such as AT&T is currently subject to a charge by Southeast of \$ 0.00169 per mile from the access tandem.

By contrast, a CLEC that does not qualify for the rural exemption currently may not lawfully tariff an interstate access rate greater than \$0.012 per minute in areas it served prior to June 21, 2001, and after June 21, 2004 that CLEC benchmark rate will be the rate charged for similar services by the competing ILEC. See 47 C.F.R. § 61.26(c). In areas within a Metropolitan Statistical Area ("MSA") that the non-rural CLEC began to serve after June 21, 2001, the benchmark is already set at the competing ILEC rate.

under the Commission's access rules, and be required to charge IXCs no more than the benchmark rate under tariff. Southeast asserts (*id.*) that this choice "forces Southeast into a dilemma," and requests that the Commission therefore grant the CLEC a waiver of the requirements for satisfaction of the rural exemption so long as 95 percent or more of its customers are located outside metropolitan areas.

Southeast has not remotely demonstrated that it satisfies the standard for grant of a waiver of Section 61.26(a)(6). As a threshold matter, the petition fails to make any showing of "special circumstances [that] warrant a deviation" from the prescribed qualification for the rural exemption.³ Southeast's claim that it occasionally receives requests from its business subscribers to serve satellite offices of those subscribers located within metropolitan areas could equally well be made by numerous other rural CLECs. In like manner, Southeast is scarcely the only rural CLEC whose residential subscribers include customers with college age children or other dependants and relatives that reside in urban areas, and whom the rural CLEC's residence customers may wish to obtain service from that local carrier. It is well established that a request based on facts that affect the majority (or, as here, virtually all) of the class that is subject to the regulation in question does not make out the "unique and extraordinary circumstances" required to justify waiver of a Commission rule.⁴

Even apart from this bar to the relief it seeks, Southeast's waiver request must be denied because it is squarely at odds with the Commission's objectives in

³ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

⁴ *See, e.g., NECA (Petition for Waivers of Sections 36.191(a) and 36.421(a) of the Commission's Rules)*, 3 FCC Rcd 6042 (1988)(waiver denied where rationale for relief would apply to some 1300 local carriers).

adopting the rural exemption. As Southeast is constrained to acknowledge (Pet., p. 4), the *CLEC Access Charge Order* established a “bright line” test for determining compliance with the rural exemption standard. As the Commission stated there, “the availability of the exemption (and the higher access rates that come with it) should be determined based on the CLEC’s entire service area, and *not* on a subscriber-by-subscriber basis.”⁵ Yet the relief Southeast seeks is posited on exactly the type of subscriber-specific analysis that the Commission determined in the *CLEC Access Charge Order* should not be followed. A waiver applicant must recognize the validity of the regulation from which relief is sought.⁶ Southeast’s petition castigating the alleged “rigidity” of the prescribed criteria for determining rural carrier status instead implicitly rejects the validity of the Commission’s limitations on the rural exemption.

Southeast’s further claim (Pet., pp. 5-7) that its requested waiver is in the public interest is equally misplaced. Allowing a CLEC to retain the rural exemption so long as 95 percent or more of its customers are located outside metropolitan areas would create powerful incentives for a CLEC that has heretofore qualified for the rural exemption to seek out a few customers in metropolitan areas that generate a large volume of traffic for which the “rural” CLEC could then assess access rates on IXC’s that far exceed the level that would have been charged for the same service under the Commission’s prescribed benchmark rates. There is simply no reason for the

⁵ *CLEC Access Charge Order*, 16 FCC Rcd at 9953 (¶ 75)(emphasis supplied).

⁶ See *Wait Radio*, supra, 418 F.2d at 1157, quoting *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968)(“very essence of waiver is the assumed validity of the general rule. . . .”)

Commission to grant a waiver request here that is already patently deficient under settled principles and that opens the door to gaming the established CLEC access charge regime.

WHEREFORE, for the reasons stated above, Southeast's petition for waiver of Section 61.26(a)(6) of the Commission's rules should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Tracy Lea Rudnicki, do hereby certify that on this 23rd day of April 2004, a copy of the foregoing "AT&T Comments" was served by U.S. first class mail, postage prepaid, on the parties listed below.

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